



Seattle/King County Department of Health

OSS Workgroup Meeting Tuesday, August 23, 2016

Environmental Health Services,

14350 SE Eastgate Way, Bellevue, WA 98007

Public Comment to OSS Workgroup and other interested parties regarding

King County On Site Sewage System Management Plan

Citizens' Alliance for Property Rights (CAPR) has reviewed the draft King County On-Site Sewage System Management Plan, and have specific concerns about assumptions made in the plan. These concerns have been shared at public meetings, with Councilwoman Kathy Lambert, and with the Seattle/King County Board of Health.

Our research indicates there has been a lack of understanding of law and directives in RCWs and WACs in the preparation of the OSS Management Plan.

Funding Sources for OSS Management have not been pursued, and confusion exists regarding RCWs and funding mechanisms contained in them. We request the Seattle/King County Board of Health actively research and pursue all funding available for OSS Management prior to enacting the proposed BOH OSS Management Update, and any rule making done at the county level. These funding mechanisms do not necessarily include a yearly fee, which has in fact been rejected by the legislature on two occasions. Current law provides any such fees for services shall not exceed the actual cost of providing any such services. Citizens' Alliance for Property Rights is actively working with legislators to help align confusion caused by several different RCWs regarding management of OSS, and to investigate WAC 246-272-0015, relied upon by county rule-making as to compliance with legislative intent. CAPR is dismayed to find that although the county relied upon this WAC, the entirety of the WAC has not been addressed, leading to concerns regarding property rights by CAPR and the general public.

Citizens' Alliance for Property Rights is prepared to share results of our research and conclusions made about compliance with current RCWs, please see attached our published list of concerns. CAPR is pleased to make their lobbyist available to you to discuss concerns about OSS management rule-making in detail.

Thank you

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Concerns Regarding BOH 16-B12 and BOH Resolution No. 16.03 and Staff Report

Compiled by Citizens' Alliance for Property Rights

BOH 16.03 recites that current laws mandate Public Health-Seattle and King County to monitor and regulate septic systems (WAC 246-272A) and to implement a septic system program management plan for public health protection (RCW 70.118A).

WAC 246-272-0015 (7) gives the local health officer the discretion to require the owner of the OSS to provide dedicated easements for inspections, maintenance and potential future expansion of the OSS. The Board could argue that effective OSS oversight requires mandatory easements to allow government officials to enter private property at will and without justification. It is not clear in the WAC if the word discretion is referring to all septic owners or if it refers to owners of failing systems. Citizens are concerned that the BOH 16.03 fails to address this portion of the WAC. BOH 16-B12 does not address this portion of WAC 246-272-0015. The BOH is relying heavily on this WAC for rule making and it must address all portions of the WAC and not ignore and exclude portions of the WAC.

“(h) Describe the capacity of the local health jurisdiction to adequately fund the local OSS plan, including the ability to find failing and unknown systems; and” Clearly, this has not been addressed in BOH 16.03 and BOH 16-B12 as seen by the failure to address existing law in RCWs. RCW 70.118A.080, RCW 70.05.19070.05.060, RCW 70.05.130, RCW 70.08.080, RCW 70.08.090.

The BOH briefing #16-B12 fails to address the contractual source of funds mandated by the Legislature under RCW 70.118A.080(1).

RCW 70.118A.080

Department to contract with local health jurisdictions—Funding assistance—Requirements—Revised compliance dates—Work group.

(1) The department shall enter into a contract with each local health jurisdiction subject to the requirements of this chapter to implement plans developed under this chapter, and to develop or enhance electronic data systems required by this chapter. The contract must include state funding assistance to the local health jurisdiction from funds appropriated to the department for this purpose.

(2) The contract must require, at a minimum, that within a marine recovery area, the local health jurisdiction:

(a) Show progressive improvement in finding failing systems;

(b) Show progressive improvement in working with on-site sewage disposal system owners to make needed system repairs;

(c) Is actively taking steps to find previously unknown systems and ensuring that they are inspected as required and repaired if necessary;

(d) Show progressive improvement in the percentage of on-site sewage disposal systems that are included in an electronic data system; and

(e) Of those on-site sewage disposal systems in the electronic data system, show progressive improvement in the percentage that have had required inspections.

(3) The contract must also include provisions for state assistance in updating the plan. Beginning July 1, 2012, the contract may adopt revised compliance dates, including those in RCW 70.118A.050, where the local health jurisdiction has demonstrated substantial progress in updating the on-site strategy.

(4) The department shall convene a work group for the purpose of making recommendations to the appropriate committees of the legislature for the development of certification or licensing of maintenance specialists. The work group shall make its recommendation with consideration given to the 1998 report to the legislature entitled "On-Site Wastewater Certification Work Group" as it pertains to maintenance specialists. The work group may give priority to appropriate levels of certification or licensure of maintenance specialists who work in the Puget Sound basin.

RCW 70.05.190 authorizes local boards of health to impose reasonable fees sufficient to pay for the actual costs of administration of the on-site sewage program management plan.

section 1(a) and expressly limits the services for which fees may be charged to the actual cost of issuing or renewing licenses or permits or other services authorized by the law and the state board of health, and limits the BOH to powers designated in RCW 70.05.060(7).

RCW 70.05.190

On-site sewage program management plans—Authority of certain boards of health.

(1) A local board of health in the twelve counties bordering Puget Sound implementing an on-site sewage program management plan may:

(a) Impose and collect reasonable rates or charges in an amount sufficient to pay for the actual costs of administration and operation of the on-site sewage program management plan; and

(b) Contract with the county treasurer to collect the rates or charges imposed under this section in accordance with RCW 84.56.035.

Chapter 84.56 RCW COLLECTION OF TAXES RCW 84.56.035 Special assessments, excise taxes, or rates and charges—Collection by county treasurer authorized.

(2) In executing the provisions in subsection (1) of this section, a local board of health does not have the authority to impose a lien on real property for failure to pay rates and charges imposed by this section.

(3) Nothing in this section provides a local board of health with the ability to impose and collect rates and charges related to the implementation of an on-site sewage program management plan beyond those powers currently designated under RCW 70.05.060(7).

RCW 70.05.060(7)

(7) Establish fee schedules for issuing or renewing licenses or permits or for such other services as are authorized by the law and the rules of the state board of health: PROVIDED, That such fees for services shall not exceed the actual cost of providing any such services.

BOH 16.03 and BOH 16-B12 does not provide a complete analysis of the actual cost of providing services related to OSS rule making and in fact states the annual budget includes program infrastructure and investigators. Cost analysis of does not provide evidence of providing the actual service provided to individual OSS owners.

The most current "King County On-Site Septic System Management Plan July 2007" reads on page 17, "Although OSS are frequently cited as potential contaminant sources in various reports there are little data that specifically link impairment to inadequate septic systems." This statement indicates there is not a problem that can be linked to an economic analysis related to OSS systems which could be related to fees for costs for actual services provided to individual OSS owners.

Additionally, the document "Funding Strategy for the Strategic Initiatives from the 2012-2013 Puget Sound Action Agenda ,Volume 1: Summary of Findings and Recommendations, Final Report August 13, 2014 With corrections to shellfish funding information as of September 9, 2014; Prepared for: Puget Sound Partnership Ecosystem Coordination Board Finance Subcommittee" directly reads:

"The Department of Health (DOH) is leading two priority projects of the Puget Sound Action Agenda to (1) assess the viability of establishing a unified, self-sustaining septic loan program in the Puget Sound region, and (2) identify ways to support the development and implementation of septic management programs by local health jurisdictions."

"It is expected that the DOH will seek the approval of the state legislature for funding to support both programs. Given their importance to the success of the Shellfish Initiative, it is recommended that the Puget Sound Partnership and partner agencies and organizations strongly support the funding recommendations."

"Funding of the loan program and the septic management program would address all of the funding needs in the Shellfish Initiative as it is currently scoped."

The Seattle King County Health Department is attempting to introduce a program that was proposed in the legislature but was not passed by the legislature. HB 1715 - 2015-16 Protecting Puget Sound through funding and implementing local on-site sewage program management plans.
<http://app.leg.wa.gov/billinfo/summary.aspx?bill=1715&year=2015>

The Seattle/King County BOH rule making appears to be operating outside the intent of the legislative body and thus beyond their administrative authority. It is obvious the state legislature did not intend for this program to go forward, or it would have passed the bill making it law.

RCW 70.05.130

Expenses of state, health district, or county in enforcing health laws and rules—Payment by county.

All expenses incurred by the state, health district, or county in carrying out the provisions of chapters 70.05 and 70.46 RCW or any other public health law, or the rules of the department of health enacted

under such laws, shall be paid by the county and such expenses shall constitute a claim against the general fund as provided in this section.

RCW 70.08.080

Pooling of funds.

The city by ordinance, and the county by appropriate legislative enactment, under this chapter may pool all or any part of their respective funds available for public health purposes, in the office of the city treasurer or the office of the county treasurer in a special pooling fund to be established in accordance with agreements between the legislative authorities of said city and county and which shall be expended for the combined health department.

RCW 70.08.090

Other cities or agencies may contract for services. Any other city in said county, other governmental agency or any charitable or health agency may by contract or by agreement with the governing bodies of the combined health department receive public health services.

It is likely that Title 13, the current State Board of Health Rule for On-Site Sewage, will have to be repealed, or amended to accommodate "equity concerns" of the Board and expand oversight authority.

In BOH 16.03 and BOH 16-B12 Equity concerns:

Many of the poorly functioning systems are located in lower socioeconomic status areas. Some property owners in these areas are unaware they have OSS or do not know how to maintain OSS, resulting in unsafe waste disposal practices that have contributed to groundwater contamination. When these systems fail, many owners face expensive repair bills that they are unable to afford. Additionally, many parcels in socioeconomically disadvantaged areas contain OSS permitted as "temporary until sewer," but sewer districts lack financial incentives to expand to these areas. As a result, these "temporary" septic systems have been in use longer than they were meant to and are probable contributors to groundwater contamination. Due to a lack of information on how to maintain OSS, inability of owners to afford OSS repairs or connection to sewer, and the presence of temporary septic systems, it is likely that socioeconomically disadvantaged communities are experiencing higher levels of groundwater contamination than other areas of King County. To address the pollution problems in these areas, it is important to know how many homes are served by failing systems. These areas need Public Health staff to address failing systems and to work with septic systems owners to ensure proper septic system use and routine maintenance. Properly functioning septic systems are vital to protecting public health, preserving highly valued groundwater, lakes, streams, and Puget Sound and avoiding costly repairs that can result from neglect.

Seattle/King County BOH Title 13

13.04.020 Declaration of purpose and policy.

A. In compliance with chapter 246-272A WAC, this title is enacted as an exercise of the Board of Health power of King County to protect and preserve the public health. Its provisions shall be liberally construed for the accomplishment of this purpose.

B. It is expressly the purpose of this title to provide for and promote the health of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this title.

C. It is the specific intent of this title to place the obligation of complying with its requirements upon the owner or operator of premises and other persons designated by this title within its scope, and no provision of or term used in this title is intended to impose any duty whatsoever upon King County or any of its officers or employees, for whom the implementation or enforcement of this title shall be discretionary and not mandatory.

D. Nothing contained in this title is intended to be nor shall be construed to create or form the basis for any liability on the part of King County, or its officers, employees or agents, for any injury or damage resulting from the failure of the owner or operator of any premises to comply with the provisions of this title, or by reason or in consequence of any act or omission in connection with the implementation or enforcement of this title on the part of King County by its officers, employees or agents.

The BOH 16.03 report contends that EHS currently does not have the capacity to perform inspections or to educate OSS owners. However, the fact is that homeowners, not government, are obligated by law to have their onsite septic systems inspected, pumped and repaired at timely intervals. Private property OSS owners pay private sector septic tank professionals to provide these services.

It is clear the Seattle King County BOH resolution being proposed is not even in keeping with title 13.04.020. The BOH must revise the proposal to fit current law.

RCW 34.05.570(2)(c) states a rule may only be set aside if the rule "violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

BOH 16.03 may be in part nullified by the avoidance of the above RCWs in WAC 246-272-0015. By ignoring the WACs, the rule is calling for Counties to regulate in a way that is willful and unreasoning and taken without regard to attending facts or circumstances. This situation is aggravated by the BOH 16.03 incomplete and questionable interpretation of portions of the WAC, and attendance to rule making in that it appears to have been out of compliance with interpreting statutory authority, and does not sufficiently analyze costs in direct correlation to services provided.

Citizens object to the propensity of the Seattle/King County BOH to base their proposal on WAC 246-272-0115 in an incomplete fashion. It appears to be an attempt to pick and choose which portions of the WAC are deemed to be most important to the means sought in 16.03, while ignoring entirely other sections or provisions in WAC 246-272-0015. It is most likely outside of legislative intent to propose regulations based on incomplete application of a WAC or RCW.

Administrative law does not include the authority to create taxes or to created new sources of funding for an agency or department, only the legislature can do this. RCWs must be adhered to when an agency is considering the funding of a program. WACs must conform to RCWs. Current law does not provide for the implementation of Resolution 16.03 as proposed. BOH 16.03 is attempting an unconstitutional regulatory path and must be revised or abandoned.